EXHIBIT A

C
Briefs and Other Related Documents
Only the Westlaw citation is currently available.
United States District Court,S.D. New York.
Barbara TOMASINO, Plaintiff,
v.
MOUNT SINAI MEDICAL CENTER AND HOSPITAL, Defendants.
No. 97 Civ. 5252(TPG).

March 13, 2003.

Nurse sued hospital, alleging violations of Age Discrimination in Employment Act (ADEA) and defamation. On hospital's motion for summary judgment, the District Court, Griesa, J., held that: (1) claim was not barred under doctrine of res judicata; (2) nurse was not collaterally estopped from bringing claim; (3) arbitrator's factual findings were entitled to great weight; (4) alleged less severe discipline of comparators did not support claim; (5) Court of Appeals lacked jurisdiction over claims for harassment and retaliation following reinstatement; (6) hospital's notice to Office of Professional Discipline (OPD) was not defamatory; (7) nurse manager's alleged statement that nurse had been terminated for cause was not defamatory; and (8) nursing supervisor's alleged statement fell within qualified privilege against defamation claims.

Motion granted.

West Headnotes

[1] Judgment 228 828.7

228 Judgment
228XVII Foreign Judgments
228k828 Effect of Judgments of State Courts in United States Courts
228k828.7 k. Nature of State Tribunal. Most Cited Cases
Nurse's ADEA claim was not barred, under doctrine of res judicata, by prior arbitration award as affirmed by state court rulings, where such proceedings did not purport to deal with nurse's claims of harassment and retaliation occurring after reinstatement, or deal with claim that discharge resulted from age discrimination, and arbitrator and court found that nurse had been discharged without just cause. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C.A. § 621 et seq.

[2] Judgment 228 828.7

228 Judgment
228XVII Foreign Judgments
228k828 Effect of Judgments of State Courts in United States Courts
228k828.7 k. Nature of State Tribunal. Most Cited Cases
Nurse was not collaterally estopped from bringing ADEA claim, due to prior arbitration proceedings, as affirmed by state court rulings, in which she was found to have committed misconduct warranting suspension, where arbitration proceeding was not under any anti-discrimination law and arbitrator made no reference to age discrimination. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C.A. § 621 et seq.

[3] T 406

25T Alternative Dispute Resolution
25TII Arbitration
25TII(H) Review, Conclusiveness, and Enforcement of Award
25Tk406 k. Pleading and Evidence of Award as Estoppel or Defense. Most Cited Cases
(Formerly 33k80 Arbitration)
Arbitrator's decision, including findings that nurse committed misconduct but that suspension rather than termination was appropriate, was admissible in ADEA action, and arbitrator's factual findings were entitled to great weight, where decision followed five days of hearings, parties were represented by counsel, and arbitrator issued thorough 22-page decision. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C.A. § 621 et seq.

[4] Civil Rights 78 1210

78 Civil Rights
78II Employment Practices
78k1199 Age Discrimination
78k1210 k. Disparate Treatment. Most Cited Cases
(Formerly 78k168.1)
Four nurses whom hospital allegedly disciplined less severely than terminated nurse were not similarly situated to terminated nurse in all material respects, and, thus, the alleged less severe discipline did not

support terminated nurse's ADEA claim, where terminated nurse, but none of the four alleged comparators, medicated patient with controlled substance without doctor's order. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C.A. § 621 et seq.

[5] Civil Rights 78 ⚷1516

78 Civil Rights
78IV Remedies Under Federal Employment Discrimination Statutes
78k1512 Exhaustion of Administrative Remedies Before Resort to Courts
78k1516 k. Scope of Administrative Proceedings; Like or Related Claims. Most Cited Cases
(Formerly 78k362.1)

Health 198H ⚷266

198H Health
198HI Regulation in General
198HI(C) Institutions and Facilities
198Hk259 Officers and Employees
198Hk266 k. Adverse Employment Action; Wrongful Discharge. Most Cited Cases

Court of Appeals lacked jurisdiction over nurse's ADEA claims for harassment and retaliation following her reinstatement, where her Equal Employment Opportunity Commission (EEOC) complaint dealt solely with her discharge, nurse's harassment and retaliation allegations were of different nature from her unlawful discharge claim, and alleged harassment and retaliation occurred four years after conduct cited in EEOC charge. Age Discrimination in Employment Act of 1967, 2 et seq., 29 U.S.C.A. § 621 et seq.

[6] Libel and Slander 237 ⚷42(2)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k42 Reports
237k42(2) k. Executive and Legislative Proceedings and Investigations. Most Cited Cases

Libel and Slander 237 ⚷50

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k50 k. Good Faith in Exercise of Privilege or Right. Most Cited Cases

Hospital's notice to New York State Department of Education, Office of Professional Discipline (OPD), stating that nurse had been discharged for administering morphine without physician's order and had falsified documentation, was not defamatory under New York law, where hospital was required by law to notify OPD as to its action, and notice contained accurate record of action taken and reasons believed by hospital to justify action. N.Y. Public Health Law § 2803-e(1)(a), (3)(b).

[7] Libel and Slander 237 ⚷30

237 Libel and Slander
237I Words and Acts Actionable, and Liability Therefor
237k30 k. Falsity. Most Cited Cases

Under New York law, nurse manager's alleged statement that nurse had been terminated for cause was not defamatory, notwithstanding that arbitrator later found that termination was not based on just cause, inasmuch as alleged statement was true, reflecting bona fide judgment of hospital.

[8] Libel and Slander 237 ⚷45(2)

237 Libel and Slander
237II Privileged Communications, and Malice Therein
237k40 Qualified Privilege
237k45 Common Interest in Subject-Matter
237k45(2) k. Common Business Interest. Most Cited Cases

Under New York law, nursing supervisor's alleged statement to physician, that nurse's license had been suspended, fell within qualified privilege against defamation claims, inasmuch as nurse managers and physicians shared common interest in qualifications of nursing staff.

OPINION

GRIESA, J.

*1 Plaintiff Barbara Tomasino sues Mt. Sinai Medical Center and Hospital, asserting various claims arising out of an employment dispute. The action was commenced on July 17, 1997. This case was formerly assigned to Judge Knapp of this court. In response to Mt. Sinai's motion, Judge Knapp dismissed a claim for intentional infliction of emotional distress. Tomasino has now filed a second amended complaint.

Tomasino asserts four causes of action: (1) age discrimination in violation of the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. § § 621 *et seq.;* (2) defamation in connection with a letter concerning Tomasino which Mt. Sinai submitted to the New York State Department of Education, Office of Professional Discipline ("OPD"); (3) defamation in connection with alleged statements to Mt. Sinai's staff that Tomasino's employment had been terminated for cause; and (4) defamation in connection with an alleged statement to Dr. Laurie Goldstein at Mt. Sinai that Tomasino's nursing license had been suspended.

The nature of Tomasino's age discrimination claim is as follows. She claims that she was terminated by Mt. Sinai because of her age. She further contends that, following rulings by an arbitrator and the state courts to the effect that she must be reinstated after a disciplinary suspension, Mt. Sinai engaged in harassment and retaliation, all in violation of the ADEA.

In this connection, the second amended complaint alleges harassment but contains no allegation of retaliation. However, Tomasino's submissions on the present summary judgment motion add the retaliation claim, and the court will consider that to be part of her case.

Mt. Sinai now moves for summary judgment dismissing all remaining causes of action. The motion is granted.

FACTS

1. *The July 8, 1996 Incident*

The dispute between Tomasino and Mt. Sinai arises from Tomasino administering morphine to a patient. Under New York Law, nurses are not authorized to administer a controlled substance such as morphine without a doctor's order. The applicable section states in pertinent part that "[a]ll drugs and biologicals shall be administered in accordance with the orders of the practitioner or practitioners responsible for the Patient's care...." N.Y.Codes Rules & Regulations, tit. 10, § 405.5(c).

Mt. Sinai's policies were consistent with this law. Under the medication policy of Mt. Sinai's Nursing Department, controlled substances may only be administered by nurses such as Tomasino pursuant to a written order signed by a New York State licensed physician. The Nursing Department's medication policy also describes the emergency procedures for accepting a verbal order from a physician and the requirement to follow up such an order with a written one signed by the physician within 24 hours.

On July 8, 1996 Tomasino was the duty nurse in the recovery room on Mt. Sinai's Labor and Delivery ("L & D") Floor K-2. At approximately 1330 that day, Nurse Jean Merritt brought a patient to the recovery room after the patient had given birth to twins. The patient's name is generally excised from the record submitted on the present motion, and references hereafter in the opinion will be to "the Patient." Some time after the Patient was brought to the recovery room, she began to complain of excruciating pain in her left side. The Patient's physician was Dr. Karen Kirsch, but apparently Dr. Kirsch was not available. Nurse Merritt spoke to the Chief Resident on duty, Dr. Gita Iraj, who ordered Merritt to give Demerol to the Patient. Merritt attempted to obtain Demerol from the K-2 automated PYXIS Medstation but was unable to do so because the drawer containing Demerol had jammed. This occurred at 1452.

***2** The PYXIS Medstation is a computerized storage and dispensing device used to dispense controlled substances and other medications. Access to the PYXIS system requires an identification code and password. Events such as medication withdrawals and drawer malfunctions are logged in the PYXIS system.

Following the drawer failure, Merritt asked Iraj for an order for morphine, and Iraj responded that the Patient should not have morphine but should have Demerol.

Merritt then went to another floor to obtain Demerol from an operable PYXIS. Following Merritt's departure, Tomasino obtained a 15mg tubex of morphine from another drawer in the K-2 PYXIS which was not jammed and administered three 3mg doses of morphine to the Patient, for a total of 9mg. As a result of Tomasino administering the morphine, the Patient's pain was relieved.

Anastasia Stekas, Clinical Nurse Manager for L & D, had heard about the problem with the PYXIS, and went to see if she could resolve it. As she was doing so, Tomasino came out of the recovery room and stated that she had medicated the Patient with morphine, and said in substance that "sometimes you have to take matters into your own hands," and that you need "to do what you have to do to make a patient comfortable." Stekas heard Tomasino say that she would get an order.

Tomasino then helped Stekas with the PYXIS. Merritt eventually returned with Demerol from floor K-5. Upon learning that Tomasino had already administered morphine to the Patient, Merritt deposited the Dermerol into a locked container and left K-2.

Tomasino had 6mg of morphine remaining in the tubex. At this time she received an assignment to the operating room to assist in an emergency Cesarean delivery. Before going to this assignment, she placed the unused morphine on an unlocked shelf in the recovery room. She subsequently returned to the recovery room and wasted the unused morphine in the presence of a witness and recorded the wasting in the K-2 PYXIS.

After leaving K-2, Merritt asked Iraj if she had authorized Tomasino to give morphine to the Patient. Iraj told Merritt that she had given no such order.

2. *Mt. Sinai's Investigation of the Incident*

Stekas, who had some knowledge of the incident, as described above, commenced an investigation on the afternoon of July 8. Among other things, she questioned Iraj on July 9, and asked her if she had given Tomasino an order for morphine. Iraj told Stekas that she had given Tomasino no such order. Iraj also stated that she would deny having made this statement since she did not want to "get anyone in trouble." Stekas then went to review the records.

On Mt. Sinai's Labor and Delivery floors, there are three records relevant to the present case.

The first is the Medication Administration Record ("MAR"). The MAR is a chronological record of all medication given during the course of a patient's care. It shows the date, time, type of medication, the reason for the administration, and the result of the administration. All entries are to be initialed. Tomasino made an entry in the Patient's MAR showing that she administered three 3mg doses of morphine to the Patient on July 8 at 1445, 1500, and 1515 for a total dosage of 9mg.

***3** These time notations are in "military time," and this style is used frequently in the records. Occasionally, the more familiar style is used-*i.e.,* "2:45 P.M., etc." This opinion will follow the usage as it appears in the records.

The second type of record is the Recovery Record, which is intended to provide a chronology of significant events throughout a Patient's recovery. The record includes entries relating to any medication administered, as well as the dose and time of the administration. All entries are to be signed.

The Patient's Recovery Record shows that her vital signs were checked by Tomasino at 1400, 1430, and 1500. Tomasino also made entries showing that three 3mg doses of morphine where administered to the Patient at 2:45 p.m., 3:00 p.m., and 3:15 p.m. for a total dosage of 9mg.

The third record is the Order Sheet. The Order Sheet is meant to serve as a chronological record of all physician orders given during the course of a Patient's care. It shows the date, time, the nature of the order, and who gave the order. It is to be signed or initialed by the nurse carrying out the order. The Patient's Order Sheet contains a notation for July 8 at 1445, which stated in substance that the Patient was to be given Morphine Sulfate in three doses of 3 milligrams each at 15 minute intervals. This notation is signed by Dr. Barbara Zucker-Pinchoff ("Zucker") and initialed by Tomasino. It is located on the sheet directly below an order for Pyridium dated July 8 at 4:00 p.m.

In her investigation, Stekas reviewed all three of these records. She also reviewed the K-2 PYXIS record for July 8. The PYXIS record has the following entries: (1) a drawer failure involving Merritt at 1452; (2) Tomasino's withdrawal of a 15mg tubex of morphine at 1501; and (3) the wasting of 6mg morphine by Tomasino in the presence of a witness at 1815.

On July 15 Zucker, who signed the notation for morphine in the Order Sheet, as described earlier, discussed the matter with Stekas and embodied what she told Stekas in the following written statement dated July 15:

To Whom it May Concern:

On Monday, July 8 I participated in the care of ... a patient of Dr. Karen Kirsch. She was in the PACU after her delivery, and was in severe pain. Barbara Tomasino, RN asked me to assess the patient, which I did. I was also aware that Dr. Iraj had ordered Demerol for the patient, but there was a delay in obtaining it. I evaluated the patient, and since Dr.

Kirsch was in the OR doing a cesarean, I stepped into the OR to discuss the patient with her. She concurred that pain medication was indicated. Because the floor was extremely busy, I gave a verbal order to Ms. Tomasino to administer morphine sulfate to the patient. I later wrote an order for the morphine in the patient's chart, that is dated and timed correctly to the best of my knowledge. If you have any questions regarding my role in these events, please contact me.

Stekas wrote a detailed summary of her investigation, describing her own observations at the time of the morphine incident and information obtained from other sources. The summary describes Tomasino's statement to Stekas on July 12 to the effect that she had received an order for the morphine from Iraj. The summary further reflects Zucker's version that it was *she* who gave the order. Stekas notes the conflict between the PYXIS record, which reflects that Tomasino withdrew morphine at 1501, and entries in the Patient's records which show morphine being administered commencing at 1445. The Stekas summary states that Tomasino could not explain this discrepancy. The Stekas summary is dated July 14, although this date may be in error because the summary refers to information obtained on July 15.

***4** Based upon her investigation, Stekas concluded that Tomasino had acted improperly regarding the morphine. On July 12 Stekas issued a "Warning Notice" to Tomasino stating:

On Monday, July 8, 1996, it is believed that you administered morphine sulfate to a Patient without a valid physician's order. It is believed that you left the remaining morphine sulfate to be wasted for approximately three hours.

Furthermore, it is believed that you falsified documentation related to this medication administration.

You are hereby suspended pending further investigation. Such action could lead to further disciplinary action up to and including termination.

Stekas met with Tomasino and gave her the notice. During this meeting Tomasino stated that she had received an order from Iraj prior to administering the morphine.

On July 17 Tomasino submitted a written statement concerning the patient incident in which she stated that she had received a written order for morphine from Zucker after Iraj agreed that morphine could be given instead of Demerol. Tomasino went on to relate that she called Iraj to ask if morphine could be administered instead of Demerol and that Iraj agreed that it could. In an undated written statement Iraj stated that she would have written an order but that she understood that Zucker had already taken care of it.

Stekas reported her findings to Kathleen Capitulo, Clinical Director of Nursing for Mt. Sinai's Maternal/Child Care Center. On July 18 Capitulo spoke with Zucker who stood by her written statement. That same day, Capitulo spoke with Iraj who stated that Tomasino had asked her to write an order for morphine after the fact.

On July 18 Capitulo decided to terminate Tomasino after consulting with her supervisor, Cherie Strickland, the Associate Director of Nursing, and with Stekas. She issued a Warning Notice to Tomasino on July 22, making the following findings:

On Monday, July 8, 1996 you administered Morphine Sulfate to a pt. You documented M.S. 3 mg IV at 14:45, 15:00, & 15:15. However, the Pyxis records show that M.S. 15 mg. was withdrawn from the machine at 15:01.

You left the remaining Morphine on a shelf in the Recovery Room of L & D and did not waste it appropriately until after 6 p.m.

It is believed that you did not have a VALID order for the Morphine PRIOR to the administration of the Morphine.

The notice stated that Tomasino was discharged.

3. *Mt. Sinai's Notice to the Office of Professional Discipline*

On July 26, 1996 Strickland wrote a letter to the New York State Department of Education, Office of Professional Discipline that Tomasino had been "involved in a Patient incident." The letter stated that Tomasino had given morphine sulfate to a patient without a valid physician's order, left the remaining morphine sulfate unattended for approximately 3 hours, and falsified documentation related to the medication administration. Attached to the letter was a copy of the July 22 Warning Notice discharging Tomasino.

***5** Under New York law, hospitals are required to report to the OPD within 30 days the termination of a licensed professional "for reasons related in any way to alleged ... malpractice or misconduct or impairment of Patient safety or welfare...." N.Y. Public Health Law § 2803-e(1)(a).

4. *The L & D Nursing Staff Meeting*

Stekas and Capitulo met with L & D nurses shortly after Tomasino's termination in response to concerns that the nurses had expressed. Stekas testified in her deposition that she consistently told the L & D nurses who requested the meeting that she could not, and would not, discuss the specific reasons for Tomasino's termination. Tomasino, who was not at that meeting, claims that Stekas announced at the meeting that Tomasino "had been terminated for cause," but does not elaborate. Stekas and Capitulo, who attended the meeting, testified in their depositions that even this general statement was not made.

5. *The Arbitration Hearing*

Tomasino's union, New York State Nurses Association ("NYSNA"), filed a grievance challenging her termination. The grievance ultimately was submitted to an arbitrator.

Five days of hearings before the Arbitrator took place between November 1997 and July 1998, during which NYSNA presented six witnesses, including Tomasino. Mt. Sinai presented eight witnesses, one of whom testified by affidavit. NYSNA was represented by an attorney and Tomasino was represented by her own attorney. The issue presented to the Arbitrator was whether Mt. Sinai had a basis for discharging Tomasino under Section 4.06 of the Collective Bargaining Agreement between NYSNA and Mt. Sinai, which provides that "an employee will be demoted, suspended, otherwise disciplined or discharged only for cause."

One of the contentions presented by NYSNA was that Tomasino's termination was the result of age discrimination. In his opening statement, NYSNA counsel informed the Arbitrator that NYSNA intended to prove that the violations Tomasino had been accused of committing either did not occur or did not warrant discipline. He further claimed that the hospital had taken "advantage of an opportunity to remove a senior nurse," while alluding to the present litigation and its underlying claim of age discrimination. The lawsuit had been commenced July 17, 1997.

Although many collective bargaining agreements have non-discrimination clauses. The Mt. Sinai nurses agreement did not have such a clause. It did have a clause (Section 4.06) requiring discipline to be administered in "a consistent manner."

In its post-hearing brief, NYSNA argued that Tomasino had been treated differently from other nurses and alleged that the "Hospital's manipulation of the facts in this case may be explained by a desire to get rid of an older nurse with a high salary."

6. *The Arbitration Award*

On December 5, 1998 the Arbitrator issued a 22-page decision. The decision is well reasoned, balanced, and thorough. The Arbitrator painstakingly considered the contentions of the parties point by point. He also undertook to resolve the questions of credibility.

***6** The Arbitrator did not expressly deal with the claim that Tomasino had been discharged because of her age. But he made the following statement as to the reason for Mt. Sinai terminating Tomasino. He described the events relating to the morphine and then stated:

Thereafter, Stekas conducted an investigation of the incident. She concluded that Tomasino was culpable of:

(1) giving morphine to a patient without first obtaining a doctor's order;

(2) leaving morphine on an unlocked shelf between multiple uses of a single-dose morphine tubex;

(3) falsifying medical records reflecting the times she had administered morphine to D.M. on July 8, 1996.

As a result, the Hospital discharged Tomasino after having suspended her on July 12, 1996.

Ultimately, the Arbitrator made his findings on the basis of his analysis of the events. He found that: (1) Tomasino had not obtained a physician's order before administering the morphine; (2) Tomasino left unused morphine unsecured; and (3) Tomasino entered incorrect medication times as to the morphine on the Patient's records, although there was insufficient evidence to support a finding of intent to falsify. The Arbitrator found "not credible" the evidence put on by NYSNA and Tomasino that there had been a doctor's order for the morphine prior to its administration.

Although the Arbitrator concluded that Tomasino's behavior deserved a disciplinary sanction, he ruled that discharge was too severe a penalty. He found that the hospital "did not have just cause to suspend and subsequently discharge Barbara Tomasino." Instead, the Arbitrator determined that the 2 1/2 years between Tomasino's discharge and the Award should be treated as a disciplinary suspension and that Tomasino should be reinstated without back pay or benefits.

The Arbitrator based his decision to reduce the penalty on evidence that Tomasino's conduct had not resulted in any actual harm to the Patient, and that morphine was not medically inappropriate in the opinion of one of the Patient's physicians. He also expressed the view that, with respect to the safeguarding of the unused morphine and the documentation, other nurses had committed similar violations and had not been discharged. It should be noted, however, that he made no finding that other nurses were guilty of "the more serious charge of dispensing medication without an order." The Arbitrator's conclusion, as already indicated, was that a disciplinary suspension was the appropriate sanction. He stated that Tomasino's "lengthy suspension constitutes a strong reminder that despite her long and valued service, she cannot assume the role of a physician, and she must administer medication only in response to a valid order, not one concocted after the fact."

7. *Court Proceedings*

On February 8, 1999 Tomasino and NYSNA petitioned the New York State Supreme Court, Albany County, to confirm the Arbitrator's award. Mt. Sinai cross-moved to vacate the Arbitrator's reinstatement order. The factual findings of the Arbitrator were not challenged by any of the parties. The only issue was the remedy for Tomasino's conduct. Tomasino sought to avoid termination but did not argue against the disciplinary suspension. Mt. Sinai continued to seek termination. In a ruling dated May 10, 1999 the Court agreed with the Arbitrator, and granted the petition to confirm the award while denying the cross-motion to vacate.

***7** Mt. Sinai appealed. On August 3, 2000 the Appellate Division, Third Department, affirmed, holding that the choice of remedy was well within the Arbitrator's authority. *In re New York State Nurses Ass'n (Mount Sinai Hosp.)*, 275 A.D.2d 538, 712 N.Y.S.2d 200 (3d Dep't 2000).

8. *Tomasino's Reinstatement*

In light of the Arbitrator's confirmation of Mt. Sinai's findings that Tomasino had administered a controlled substance without a doctor's order and failed to properly waste the unused morphine, Mt. Sinai declined to reinstate Tomasino to any position in which she would have access to controlled substances.

While the appeal to the Appellate Division was pending, a position became available in Mt. Sinai's community outreach program for a clinical nurse with OB/GYN training. On April 19, 2000 the job was offered to Tomasino at the level of pay and benefits that she would have earned as a nurse in L & D. On May 1 Tomasino accepted the offer and returned to work. Tomasino was made whole for the wages and benefits that she would have earned had she been reinstated immediately after issuance of the Arbitrator's Award.

9. *The Statement to Dr. Goldstein*

Dr. Laurie Goldstein, an obstetrician in the L & D unit, had signed a petition seeking Tomasino's reinstatement at the time of Tomasino's discharge in July 1996. Near the time of Tomasino's reinstatement in April 2000, Ed Heath, the current L & D Clinical Nurse Manager, who had replaced Stekas in April 1999, had a conversation with Goldstein concerning Tomasino's return to work. Goldstein asked Heath if Tomasino was returning to work in L & D and stated that she was "a great nurse." Heath responded by asking why, if this were true, Tomasino's nursing license had been suspended. Heath recalls Goldstein saying "something to the effect that 'I didn't know that." ' Heath then shrugged and the conversation ended.

There is no evidence that anyone overheard Heath's comment, or that Heath ever made this comment to anyone else. On the same day as her exchange with Heath, Goldstein had lunch with Tomasino and asked her if her license had been suspended. Tomasino denied that it had, Goldstein accepted this denial without further inquiry, and the two continued their lunch. Tomasino testified in her deposition that she was not aware of any harm to her reputation or career from Heath's comment.

10. *Tomasino's Allegations of Disparate Treatment*

An element of Tomasino's age discrimination claim is the contention that younger nurses committed the same infractions that she did, but were not disciplined or were not punished as severely. Tomasino refers to four nurses. One of these is Jean Merritt, already mentioned in this opinion. The others are Linda Maddocks, Ruth Jones, and Elizabeth Sakell. Although the details of certain instances of hospital policy violations by these four nurses are dealt with on the present motion, there is no need to repeat these details for purposes of this opinion. The salient fact is that the most serious infraction found to have been committed by Tomasino was administering a controlled substance to a patient without a doctor's order. There is no evidence that other nurses committed this infraction and were given more lenient treatment.

***8** It should be noted that the Arbitrator had before him a claim that Mt. Sinai had violated the provision of the collective bargaining agreement requiring discipline to be administered in a consistent manner. The Arbitrator's decision did not dwell on this claim in any very specific fashion. But, as already noted, the Arbitrator did find that, with respect to the safeguarding of the unused morphine and the documentation, other nurses had committed similar violations and had not been discharged. This was one reason that the Arbitrator reduced the penalty from termination to disciplinary suspension. However, it is noteworthy that the Arbitrator made no finding that other nurses had committed what he referred to as "the more serious charge of dispensing medication without an order." He made no finding that there was any inconsistent disciplinary treatment with respect to that infraction.

11. *Tomasino's Complaint to the EEOC-Its Bearing on Her Claim of Harassment and Retaliation*

On February 3, 1997 Tomasino filed an age discrimination complaint with the United States Equal Employment Opportunity Commission ("EEOC"). Mt. Sinai responded to Tomasino's allegations in the complaint on May 9, 1997. The record does not indicate the exact nature of the EEOC's response. It will be assumed that the EEOC notified Tomasino of her right to sue.

Tomasino's EEOC complaint of age discrimination dealt solely with her termination by Mt. Sinai on July 22, 1996 and the events leading up to that termination. Although she now claims in this lawsuit that she was the victim of harassment and retaliation committed by Mt. Sinai against her following her reinstatement in May 2000, she filed no new EEOC complaint alleging such harassment and retaliation.

The details of Tomasino's claims of harassment and retaliation need not be described. As will be discussed later, there is no jurisdiction over these claims.

DISCUSSION

1. *The Effect of the Arbitrator's Award on Tomasino's ADEA Claim*

Mt. Sinai argues that the Arbitrator's award, as affirmed by the state court rulings, bars Tomasino's age discrimination claim by virtue of the doctrine of *res judicata.* Alternatively, Mt. Sinai contends that the doctrine of collateral estoppel precludes relitigation of the Arbitrator's findings regarding Tomasino's misconduct. Tomasino disagrees on both points.

[1] Mt. Sinai's *res judicata* argument can be disposed of quickly. At the very most, there could be a *res judicata* bar only as to Tomasino's claim about her discharge. The arbitration and the state court proceedings did not purport to deal with her claims of harassment and retaliation occurring after her reinstatement. On the issue of Tomasino's discharge, the arbitration ruling and state court judgment did not deal with Tomasino's claim that her discharge resulted from age discrimination. More importantly, the Arbitrator held (as affirmed by the court) that Tomasino had been discharged without just cause. Thus, Mt. Sinai did not obtain a judgment in its favor as to the termination, which can now be used as *res judicata* .

***9** [2] What remains for consideration is the issue of collateral estoppel. The Arbitrator *did* find Tomasino guilty of misconduct, as described above, and ruled that Tomasino should receive a disciplinary suspension because of this misconduct. The findings of misconduct, while not literally rejecting an age discrimination claim, are surely relevant on the issue of whether Mt. Sinai sanctioned Tomasino because of age discrimination or because of misconduct. This leads to the issue of whether Mt. Sinai is entitled to the application of the doctrine of collateral estoppel to prevent Tomasino from relitigating the Arbitrator's findings of misconduct. At this point, two Supreme Court cases which have been referred to extensively by the parties require discussion.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), an African-American employee filed a grievance with his union. He claimed that he had been discharged in violation of the anti-discrimination clause in a collective bargaining agreement. The matter went to arbitration. After a hearing, the arbitrator ruled that the employee had been discharged for just cause, but made no express reference to the employee's claim of racial discrimination. While the arbitration proceeding was pending, the employee filed a charge of racial discrimination with the Colorado Civil Rights Commission, which referred the matter to the EEOC. The EEOC found no reasonable cause to believe that a Title VII violation had occurred, and notified the employee of his right to sue. He then brought a Title VII action in federal court. The EEOC determination and the bringing of the suit both occurred after the arbitration had been concluded.

The district court granted the employer's motion for summary judgment and dismissed the action, holding that the arbitrator's ruling precluded the employee from bringing the court action. The district court relied on the theories of election of remedies and waiver. The court of appeals affirmed. The Supreme Court reversed.

The Supreme Court held that neither the election of remedies theory nor the waiver theory could preclude the employee's Title VII action. The Court contrasted the contractual rights under a collective bargaining agreement with the statutory right to be free from discrimination provided for by Congress. *Id.* at 49-50. The Court then stated that the strong public policies underlying the anti-discrimination statute and the right to sue thereunder are not satisfied by a resolution of contract rights by an arbitrator. This is true even though the contractual rights may be similar to, or duplicative of substantive rights under Title VII. *Id.* at 49. Furthermore, in a footnote, the Court stated that:

The policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel.

Id. at 49 n. 10.

After ruling that the case should be remanded for the district court to consider the employee's claim *de novo,* the Supreme Court announced that the arbitral decision might be admitted into evidence. The Court stated:

***10** The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.

Id. at 60. In an accompanying footnote, the Court stated that the weight to be accorded an arbitral decision in a discrimination suit must be determined with regard to the facts and circumstances of each case. But, the court listed certain relevant factors, mainly relating to the degree to which the arbitration actually deals with the issue of discrimination. Also, to be considered is the procedural fairness in the arbitral forum. *Id.* at 60 n. 21.

In Kremer v. Chemical Const. Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982), a Polish Jewish employee filed a discrimination charge with the EEOC, asserting that his discharge and failure to be rehired were due to his national origin and Jewish faith. The EEOC referred the matter to the New York State Division of Human Rights ("NYDHR"). The NYDHR found no probable cause as to the discrimination claim. This finding was upheld by NYDHR's Appeal Board. The employee petitioned the Appellate Division of the New York Supreme Court to set aside the ruling. The Appellate Division unanimously affirmed the Appeal Board's order. The employee did not seek review by the New York Court of Appeals. The employee made a direct application to the EEOC, which turned it down. The employee then brought a Title VII action in federal court. The district court dismissed the complaint on the ground of *res judicata.* The Second Circuit affirmed. The Supreme Court affirmed with a 5-4 majority.

The Court relied upon 28 U.S.C. § 1738, which provides that:

The ... judicial proceedings of any court of any such State ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State....

The Court held that where a state agency heard a claim under the state's anti-discrimination law, and where that agency's determination was reviewed by a state court, resulting in a state court judgment, that judgement precluded the bringing of a Title VII action in a federal court. The majority of the Court summarized its reasoning as follows:In our system of jurisprudence the usual role is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted in federal law, can be justified only if plainly stated by Congress. Because there is no "affirmative showing" of a "clear and manifest" legislative purpose in Title VII to deny *res judicata* or collateral estoppel effect to a state court judgment affirming that a claim of employment discrimination is unproved, and because the procedures provided in New York for the determination of such claims offer a full and fair opportunity to litigate the merits, the judgment of the Court of Appeals is Affirmed.

***11** *Id.* at 485.

In applying these two Supreme Court decisions to the present case, the starting point must be *Gardner-Denver* which, like the present case, involved an arbitration ruling made pursuant to a collective bargaining agreement. *Unlike* the present case, however, *Gardner-Denver* did not involve a court judgment of any kind. However, the basis for the Supreme Court's ruling was the sharp distinction it drew between an arbitration about contractual rights under a collective bargaining agreement and litigation about statutory rights under Title VII. Also, despite the fact that *Gardner-Denver* dealt with theories of election of remedies and waiver, the Court stated that the policy reasons for rejecting these theories in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel. 415 U.S. at 49 n. 10.

It would seem clear that the *Gardner-Denver* decision weighs strongly against the application of collateral estoppel in Tomasino's age discrimination case. The fact that a court confirmed the Arbitrator's award is not sufficient to overcome the salient fact that the arbitration proceeding was about a contractual arbitration.

Mt. Sinai, however, asks the court to turn to *Kremer.* Mt. Sinai lays stress on the fact that, as in *Kremer,* so in the present case, there was a state court judgment, so that the "traditional rules of preclusion" (in the words of *Kremer*) should apply. 456 U.S. at 485.

The court disagrees. *Kremer* dealt with a claim under a state's anti-discrimination law, which was heard by a state agency followed by state court review, all of which involved the application of the state's anti-discrimination law. In the present case, while NYSNA argued age discrimination to the Arbitrator as part of Tomasino's case, the proceeding was not under any anti-discrimination law, and the Arbitrator made no reference to age discrimination in his discussion. *Kremer* does not authorize the application of collateral estoppel in Tomasino's discrimination suit.

[3] Despite the fact that collateral estoppel does not apply, it is still necessary for the court to consider the pronouncement of the Supreme Court in *Gardner-Denver* that the arbitral decision may, under proper circumstances, be admitted into evidence in employment discrimination litigation. The Second Circuit has dealt with this issue in *Collins v. New York City Transit Auth.,* 305 F.3d 113, 119 (2d Cir.2002).

In *Collins,* an African-American employee filed a complaint alleging racial discrimination with the New York State Division of Human Rights. The complaint was then referred to the EEOC. While this complaint was pending, the employee was terminated. He filed a grievance under the collective bargaining agreement, which went to arbitration. The arbitration board found that the employee had assaulted his supervisor and upheld the employee's termination. Following the arbitration hearing, the employee filed another complaint with the NYDHR, which was referred to the EEOC. The employee then brought suit in federal district court. The court granted summary judgment to the employer. The employee appealed. The Second Circuit affirmed, relying heavily on the arbitration decision to establish that the employee was guilty of serious misconduct. This, in the view of the Second Circuit, negated the claim of discrimination and retaliation. The court stressed that the arbitration board conducted three days of hearings, at which the employee was represented by his union and evidence was received. The arbitration board then issued "a reasoned fourteen-page opinion" concluding that there was corroboration of the employee's assault and that he should be discharged for it. *Id.* at 119. The court concluded:

***12** In sum, a negative arbitration decision rendered under a CBA does not preclude a Title VII action by a discharged employee. *See Gardner-Denver,* 415 U.S. at 45-60, 60 n. 21, 94 S.Ct. 1011, 39 L.Ed.2d 147. However a decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact-e.g. new evidence not before the tribunal-or that the impartiality of the proceeding was somehow compromised.

Id. at 119.

It will be remembered that *Gardner-Denver* suggested certain factors which might be considered in determining what weight to give an arbitrator's ruling as evidence in a Title VII litigation. These factors related largely to whether the arbitration actually dealt with the issue of discrimination, although the Supreme Court also listed as a factor the degree of procedural fairness involved in the arbitration. In *Collins,* the arbitration did not deal with the issue of discrimination, but the Second Circuit approved use of the arbitral decision on the basis of the thorough and fair examination of the factual issues regarding the employee's conduct.

In applying *Collins* to the present case, the court recognizes that the arbitration board in *Collins* held that the employee's termination was justified, whereas in the present case the Arbitrator ruled that Tomasino's discharge was not justified. But two circumstances must be noted. The Arbitrator did not rule that Tomasino's discharge was unjustified because it was the product of age discrimination. The Arbitrator made no ruling expressly directed to Tomasino's age discrimination claim. The relevance of the Arbitrator's decision to the present lawsuit is his specific findings regarding Tomasino's misconduct and the fact that Mt. Sinai discharged her because of this misconduct, even though the Arbitrator disagreed with Mt. Sinai about the appropriateness of this sanction. Indeed, in *Collins* the arbitration board's decision was relied on not as expressly dealing with the issues of race discrimination and retaliation, but as providing persuasive findings about the employee's misconduct.

The court concludes that the Arbitrator's decision in the Tomasino matter is entitled to great weight as to his factual findings.

As in *Collins,* these findings were made by "an independent and unbiased arbitrator based on substantial evidence after a fair hearing." Collins, 305 F.3d at 115. In the Tomasino arbitration there were five days of hearings during which both sides presented the testimony of fourteen witnesses. Not only was NYSNA represented by an attorney, but Tomasino was represented by her own attorney. The Arbitrator issued a thorough and well grounded 22-page decision.

***13** Like the Second Circuit in *Collins,* this court finds the Arbitrator's decision to be "based on substantial evidence of an undisputedly independent, neutral, and unbiased adjudicator" and therefore finds the decision to be "highly probative of the absence of discriminatory intent...." 305 F.3d at 119. Furthermore, pursuant to *Collins,* in order to survive Mt. Sinai's motion for summary judgment, Tomasino "must present strong evidence that the [arbitrator's] decision was wrong as a matter of fact or that the impartiality of the proceeding was somehow compromised." 305 F.3d at 119. None of this is shown.

Therefore, in accordance with *Gardner-Denver* and *Collins,* the court adopts the findings of the Arbitrator relevant to the present case. The factual premise of the Arbitrator's decision was that Mt. Sinai discharged Tomasino because of misconduct regarding morphine. The Arbitrator specifically so stated, as described earlier in this opinion.

After reviewing all the evidence before him, the Arbitrator found that: (1) Tomasino had not received a doctor's order to dispense morphine prior to administering it; (2) the morphine was left unsecured in violation of Mt. Sinai's rules; and (3) the medication times were incorrectly entered on the Patient's chart. However, the Arbitrator did not agree with Mt. Sinai that Tomasino had falsified the records-that is, intentionally made wrong entries. Also, the Arbitrator held that discharge was too severe a penalty and that a lengthy disciplinary suspension was sufficient. However, the Arbitrator did not indicate that Mt. Sinai's reason for the discharge was motivated by anything other than the hospital's judgment as to Tomasino's infractions.

2. *The Merits of Tomasino's ADEA Claim*

The Supreme Court stated in *Reeves v. Sanderson Plumbing Prods., Inc.,* its most recent ADEA case, that although "intermediate evidentiary burdens shift back and forth ... the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Summary judgment is appropriate in an age discrimination case when a plaintiff has presented no evidence upon which a reasonable trier of fact could base a conclusion that age was a determinative factor in a defendant's decision to discharge. Schnabel v. Abramson, 232 F.3d 83, 91 (2d Cir.2000). Once the employer has proffered its nondiscriminatory reason, "the employer will be entitled to summary judgment ... unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination." McGuiness v. Lincoln Hall, 263 F.3d 49, 55 (2d Cir.2001).

The lengthy recitation in this opinion of the evidence about the morphine incident and the reference to the Arbitrator's findings demonstrate beyond any question that the reason Mt. Sinai discharged Tomasino was her misconduct in connection with that incident. Tomasino has come forward with no evidence that could reasonably be said to support a finding of prohibited age discrimination. As indicated, the Arbitrator's disagreement with the sanction of discharge as too harsh in no way tends to establish that the hospital engaged in age discrimination.

3. *Tomasino's Allegations of Disparate Treatment*

***14** Under Second Circuit law, where a plaintiff seeks to make out a case of discrimination "by pointing to the disparate treatment of a purportedly similarly situated employee, the plaintiff must show that she shared sufficient employment characteristics with that comparator so that they could be considered similarly situated...." Shumway v. United Parcel Service, Inc., 118 F.3d 60, 64 (2d Cir.1997). In other words, where a plaintiff seeks to establish a case of discrimination by making reference to the disparate treatment of other employees, "those employees must have a situation sufficiently similar to plaintiff's to support at least a minimal inference that the difference of treatment may be attributable to discrimination." McGuiness, 263 F.3d at 54. Furthermore, "such an employee must be similarly situated in all *material* respects-not in all respects." *Id.* (emphasis in original).

[4] The factual record reveals that the four nurses whom Tomasino claims are comparators are not similarly-situated to Tomasino in all material respects. None of the comparators mentioned by Tomasino committed the most serious of the infractions for which Tomasino was discharged, *i.e.*, medicating a patient with a controlled substance without a doctor's order.

The Arbitrator found that other nurses had committed violations *similar* to those of Tomasino with respect to safeguarding the unused morphine and the documentation, but he made no such finding as to what he characterized as the "more serious charge of dispensing medication without an order."

Tomasino has not offered sufficient evidence of disparate treatment to raise any inference of age discrimination.

4. *Tomasino's Allegations of Harassment and Retaliation*

Tomasino was reinstated on May 19, 2000. In the present lawsuit she claims that she was subjected thereafter to harassment and retaliation, all in violation of the ADEA.

However, Tomasino's only complaint to the EEOC was filed February 3, 1997 and dealt solely with her discharge in July 1996. She filed no new EEOC complaint thereafter. She made no complaint to the EEOC about harassment and retaliation following her reinstatement.

Filing a charge with the EEOC is a jurisdictional prerequisite to a private civil action. Legnani v. Alitalia Linee Aeree Italiane, S.P.A., 274 F.3d 683, 686 (2d Cir.2001). Judicial relief cannot be sought for claims not stated in the original charge unless they are "reasonably related" to that charge. *Id.*

In a recent case, the Second Circuit enumerated three situations where claims not alleged in an EEOC charge would be "reasonably related" to the allegations in the charge, stating that:
Subsequent conduct is reasonably related to conduct in an EEOC charge if: (1) the claim would fall within the reasonably expected scope of an EEOC investigation of the charges of discrimination; (2) it alleges retaliation for filing the EEOC charge; or (3) the plaintiff "alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge."

***15** Alfano v. Costello, 294 F.3d 365 (2d Cir.2002).

[5] Tomasino's harassment retaliation allegations fail to satisfy any of the above exceptions. Her allegations of harassment and retaliation are of such a different nature from her claim of unlawful discharge that they could not possibly be considered to cover anything that the EEOC would have investigated in connection with her February 1997 complaint. Moreover, the allegations of harassment and retaliation involve claims of misconduct on the part of Mt. Sinai commencing almost four years after what she complained about in the EEOC charge.

There is no basis for viewing the February 1997 EEOC complaint as conferring jurisdiction over Tomasino's claim of harassment and retaliation.

5. *Tomasino's Defamation Claims*

Tomasino claims that Mt. Sinai defamed her: (1) when it notified the OPD of the fact and circumstances of her termination; (2) when Stekas allegedly announced at an L & D nursing staff meeting that Tomasino had been terminated "for cause"; and (3) when Heath remarked to Goldstein that he believed that Tomasino's nursing license had been suspended.

Aside from denying the making of certain of these statements, Mt. Sinai argues that Tomasino's claims cannot survive summary judgment since each of the allegedly defamatory statements is protected by a qualified privilege. Mt. Sinai also argues that Tomasino's claims based on the OPD notice and the alleged statement to the nurses about her termination are barred because those statements were true or substantially true.

a. New York Defamation Law

One of the defenses to defamation under New York Law is "qualified privilege." *Meloff v. New York Life Ins. Co.*, 240 F.3d 138, 145 (2d Cir.2001). Under New York Law "defamatory communications made by one person to another upon a subject in which both have an interest" are afforded qualified protection. *Meloff*, 240 F.3d at 146; *see also*, *Albert v. Loksen*, 239 F.3d 256, 272 (2d. Cir.2001); *Konikoff v. Prudential Ins. Co. of America*, 234 F.3d 92, 98 (2d Cir.2000). Once this qualified privilege has been raised it "creates a rebuttable presumption of good faith that may constitute a complete defense." *Meloff*, 240 F.3d at 146.

To rebut the assertion of a qualified privilege, a plaintiff must make two showings. First, the plaintiff must establish that the statement at issue was false. *Meloff*, 240 F.3d at 146; *Albert*, 239 F.3d at 272. Second, the plaintiff must demonstrate that the defendant abused its privilege. To do so, the plaintiff must establish that the defendant acted "beyond the scope of the privilege, acted with common law malice, or acted with knowledge that the statement was false or with a reckless disregard as to its truth." *Meloff*, 240 F.3d at 146; *Albert*, 239 F.3d at 272; *Konikoff*, 234 F.3d at 98.

In addition to the defense of a qualified privilege, under New York Law it is "fundamental that truth is an absolute, unqualified defense to a civil defamation action, and substantial truth suffices to defeat a charge of libel." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 301 (2d Cir.1986); *Jewell v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 366 (S.D.N.Y.1998). "Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge is justified." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991).

b. Mt. Sinai's Notice to the OPD

***16** The notice to the OPD consisted of a letter from Mt. Sinai dated July 26, 1996, to which was attached the Warning Notice of July 22, 1996, which had been given to Tomasino. The July 26 letter to the OPD stated that on July 8, 1996 Tomasino administered morphine without a physician's order; that she left the remaining morphine unattended for about 3 hours; and that she falsified the documentation relating to the medication administration. The Warning Notice was, of course, the document which had notified Tomasino of her discharge for the reasons therein stated. By providing this document to the OPD, Mt. Sinai informed the OPD of certain particulars, including the precise facts about the 15:01 time when the morphine was withdrawn from the PYXIS and the documentation which purported to show that the morphine was administered at 14:45, 15:00 and 15:15. The Warning Notice also stated that Tomasino had committed a "willful act potentially detrimental to the care of a patient."

[6] Tomasino claims that what Mt. Sinai sent to the OPD was defamatory. In her motion papers, Tomasino asserts that the notice to the OPD stated that she had been "discharged for cause." She contends that such a statement must be held to be defamatory because the Arbitrator found that she was not discharged for just cause. She also claims that the statement about falsifying the documentation defamed her because the Arbitrator found that she did not intentionally falsify the record although the record was incorrect. Tomasino also contends that the other elements of the notice to the OPD were defamatory because they were false.

Under New York Law, hospitals are required to report to the OPD within 30 days any termination of a licensed professional "for reasons related in any way to alleged ... malpractice or misconduct or impairment of Patient safety or welfare...." N.Y. Public Health Law § 2803-e(1)(a). The statute provides immunity from suit for any good faith report and expressly presumes the good faith of any person making such a report pursuant to the statute's requirements. N.Y. Public Health Law § 2803-e(3)(b).

With regard to Tomasino's first contention, it is necessary to point out that the notice to the OPD did not literally state that she had been "discharged for cause." A number of particulars were described, which surely meant that there had been a discharge for cause, but the notice did not use this specific terminology. Thus, the Arbitrator's finding that Tomasino had not been discharged for just cause did not constitute a kind of literal contradiction of a statement in the notice to the OPD as Tomasino argues.

The fact is that Tomasino was discharged, and she was discharged for the reasons stated to Tomasino in the Warning Notice, including falsification of the record. Mt. Sinai was required by law to advise the OPD of what it had done with regard to Tomasino. It is true, as already described, that the Arbitrator found that the discharge of Tomasino was too severe a penalty, and further found that she had not intentionally falsified the record. However, there is no suggestion in the Arbitrator's decision, nor is there any basis whatever in the evidence presented to the court, which would support the idea that the hospital did not believe in good faith that Tomasino should be discharged and did not believe in good faith that she had falsified the record. Without any question, the notice to the OPD contained an accurate record of the action taken by the hospital and the reasons believed by the hospital to justify such action. Mt. Sinai cannot be held liable for defamation on account of the notice to the OPD.

c. The Staff Meeting

***17** [7] Tomasino claims that she was defamed because Stekas stated at the meeting of nurses that Tomasino had been terminated for cause. For purposes of this motion for summary judgment, the court will assume that the statement was made. Again, Tomasino contends that the statement was defamatory because her termination was later found by the Arbitrator not to be based on just cause. Under New York Law "[c]ommunications by supervisors or co-workers made in connection with the evaluation of an employee's performance, including allegations of employee misconduct and communications regarding the reasons for an employee's discharge, fall within the privilege." *Albert*, 239 F.3d at 272. For reasons stated in the previous section of this opinion, the later determination of the Arbitrator does not mean that the initial decision of Mt. Sinai to terminate Tomasino was not based on the good faith judgment of the hospital at that time. If the statement of Stekas was made at the nurses' meeting, it was a true statement, reflecting the *bona fide* judgment of the hospital. The statement was not defamatory.

d. Heath's Statement About Tomasino's License

Tomasino claims that she was defamed by Heath when he told Goldstein that Tomasino's license had been suspended for 2 1/2 years. There was, in fact, no suspension of Tomasino's license.

[8] In the course of performing his duties as a nursing supervisor in L & D, Heath often had discussions with physicians, including Goldstein, about the skills and abilities of the nursing staff and whether there was adequate staff to handle the workload. Mt. Sinai argues that it was in the context of such a discussion with Goldstein that Heath's comment about Tomasino's license was made. Because nurse managers and the physicians they serve clearly share a common interest in the qualifications of the nursing staff, the court finds that Heath's comment was protected by the qualified privilege.

Furthermore, it is clear that Heath's statement was an innocent mistake. Goldstein met Tomasino shortly thereafter and Tomasino promptly corrected the misinformation. There is no evidence that Heath made the statement to anyone but Goldstein. In her deposition Tomasino admitted that there was no harm to her from Heath's statement. This defamation claim is without merit.

CONCLUSION

For the reasons stated above, the court determines that there is no triable issue of fact regarding any of the four causes of action alleged by Tomasino, and that Mt. Sinai is entitled to summary judgment dismissing the action.

SO ORDERED.

S.D.N.Y.,2003.
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Not Reported in F.Supp.2d, 2003 WL 1193726 (S.D.N.Y.)

Briefs and Other Related Documents (Back to top)

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